85-1557

Supreme Court, U.S.
FILED
MAR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM 1985

IN RE GRAND JURY PROCEEDINGS.) CIVIL ACTION
)
(ELLIOT ISRAEL GREENSPAN),)
Petitioner.)

By Way of a Petition
For A Writ of Certiorari
to review a Final Order
of the United States
Court of Appeals For
the First Circuit

PETITIONER ELLIOT ISRAEL GREENSPAN'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an appeal from an Order of civil contempt is rendered moot when the contemnor has purged himself of the contempt but remains under subpoena for future Grand Jury proceedings which are likely to raise the same issues forming the basis of the contempt, continues to suffer non-legal collateral consequences and could possibly be impeached as a witness at any subsequent trial due to the unreviewed contempt citation.

2. Whether a Grand Jury witness can be held in contempt where he has already answered the only questions that could possibly form the basis for the contempt, had sought a ruling from the Judge pursuant to the Court's invitation and the Assistant United States Attorney's Office had never sought to hold him in contempt.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
JURISDICTIONAL STATEMENT.	1
CONSTITUTIONAL PROVISIONS RELIED UPON .	2
STATUTORY PROVISION RELIED UPON	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS.	8
ARGUMENTS	17
I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT THAT HIS APPEAL FROM A CIVIL ORDER OF CONTEMPT WHICH HE SUBSEQUENTLY PURGED WAS MOOT BECAUSE IT IMPLICITLY CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH AND NINTH CIRCUITS AND BECAUSE IT SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS	17

Page

II. IF THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE MOOTNESS ISSUE, IT SHOULD ALSO GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MASSACHUSETTS THAT PETITIONER WAS IN CONTEMPT DESPITE THE FACT THAT HE HAD ANSWERED THE ONLY QUESTIONS THAT FORMED THE BASIS OF THE CONTEMPT ORDER, THAT PETITIONER HAD SOUGHT A RULING FROM THE JUDGE PURSUANT TO THE COURT'S INVITATION AND THAT THE ASSISTANT UNITED STATES ATTORNEY'S OFFICE HAD NEVER SOUGHT A CONTEMPT FINDING SINCE SUCH A RULING SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISION. 31

CONCLUSION. 45

APPENDIX

TABLE OF AUTHORITIES

CASES	PAGE
Aetna Life Insurance Co. v. Haworth, 300 U.S. 229 (1937).....	18
Bradley v. Fisher, 13 Wall 335 (1872).....	25
Branzburg v. Hayes, 408 U.S. 667 (1972).....	42
Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982).....	41,42
Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).....	42
Campbell, In re, 628 F.2d 1260 (9th Cir. 1980).....	19,28
Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978).....	32
DeFunis v. Odegaard, 416 U.S. 312 (1974).....	17,18
Dennis v. Sparks, 449 U.S. 24 (1980).....	25
Ealy v. Littlejohn, 569 F.2d 219 (5th Cir. 1978).....	42
Farkas, In re, 204 F. 343 (S.D.N.Y. 1913).....	38
Ginsberg v. New York, 390 U.S. 629 (1968).....	22,24
Gompers v. Buck's Store & R. Co., 221 U.S. 418 (1911).....	32,36

PAGE

Grand Jury Investigation, In re, 600 F.2d 420 (3d Cir. 1979)..... 32

Grand Jury Subpoena, In re, 583 F. Supp. 991 (E.D.N.Y. 1984)..... 42

Hunt, In re, 754 F.2d 1290 (5th Cir. 1985)..... 19

Imbler v. Pachtman, 424 U.S. 409 (1976)..... 25

Lance v. Plummer, 353 F.2d 585 (5th Cir. 1985)..... 35

Matter of A Witness Before Special October 1981 Grand Jury, 722 F.2d 349 (7th Cir. 1983).... 32

Nevitt, In re, 117 F. 448 (8th Cir. 1902)..... 32

Parker v. United States, 153 F.2d 66 (1st Cir. 1946)..... 32,35

Pierson v. Ray, 386 U.S. 547 (1967).. 25

Roche, In re, 448 U.S. 1312 (1980)... 17

Special September 1978 Grand Jury (II) (Wall), In re, 590 F.2d 245 (7th Cir.), cert. denied, 441 U.S. 944 (1979)..... 19,25, 26,27,28

Street v. New York, 394 U.S. 576 (1969)..... 21,22,24

Stump v. Sparkman, 435 U.S. 349 (1978)..... 25

PAGE

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)..... 27

United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968)..... 39

United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968)..... 18

United States v. Duncan, 456 F.2d 1401 (9th Cir. 1972)..... 39

United States v. Frumento, 552 F.2d 534 (3d Cir. 1977)..... 20,24

United States v. Galante, 298 F.2d 72 (2d Cir. 1972)..... 19,20

United States v. George, 444 F.2d 310 (6th Cir. 1971)..... 39,40

United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971)..... 40

U.S. Constitution

U.S. CONST. art. III, § 2 2,17,28

U.S. CONST. amend. I 2,4,6

U.S. CONST. amend. V 8

PAGE

Statutes

18 U.S.C. § 6002 (1982) 8

18 U.S.C. § 6003 (1982) 8,26

28 U.S.C. § 1254 (1) (1982) 1

28 U.S.C. § 1291 (1982) 7

28 U.S.C. § 1826 (1982) 3,4,7,13
31,33,34

Rules

Fed. R. Evid. 608 (b) 24

Local Rules of the United States
Court of Appeals for the First
Circuit, Rule 20 4,13,33

Sup. Ct. R. 17.1 (a).....25,30,44

Sup. Ct. R. 20.2 1

JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to Supreme Court Rule 20.2 as well as 28 U.S.C. §§ 1254 (1) (1982), in that the Petitioner's appeal was dismissed as moot by the United States Court of Appeals for the First Circuit on December 20, 1985 and, as such, constitutes a Final Order. Petitioner now duly files his Petition For A Writ of Certiorari.

CONSTITUTIONAL PROVISIONS RELIED UPON

U.S. CONST. art III, § 2

The judical Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTORY PROVISION RELIED UPON

28 U.S.C. § 1826 (1982)

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the Court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(1) the court proceeding, or
(2) the terms of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT OF THE CASE

On September 26, 1985, Petitioner, ELLIOT I. GREENSPAN, appeared before the Federal Grand Jury in Boston pursuant to a personal subpoena. At that time, the Petitioner refused to answer the first three (3) questions propounded to him by the Assistant United States Attorney, based on his First Amendment rights of the Association and Speech. U.S. CONST. amend. I. On or about September 30, 1985, the Government filed a Motion for Contempt. A Contempt Hearing was held before The Hon. A. David Mazzone, United States District Judge, on October 3, 1985. After hearing arguments of counsel, Judge Mazzone held Greenspan in civil contempt pursuant to 28 U.S.C. § 1826 (1982) until such time as he was willing to testify before the Grand Jury. Pursuant to Local Rule 20 of the Rules of the First Circuit, Judge Mazzone suspended Petitioner's commitment for forty eight (48) hours. On October 3, 1985, Petitioner's counsel informed Judge Mazzone

via letter that the Petitioner was prepared to testify before the Grand Jury and answer the questions that he had previously declined to answer. On October 4, 1985, Judge Mazzone endorsed the letter on the bottom, stating that in view of the fact that the Petitioner had indicated his intention to purge himself of contempt, the Court would:

> suspend the time of his surrender from October 5, 1985 at 10:00 AM to October 10, 1985 at 10:00 AM at which time he will appear before the Grand Jury. The Order of Contempt will stand pending his appearance.

On October 10, 1985, Petitioner appeared before the Grand Jury and testified for approximately five (5) hours. At that time, he answered the three (3) questions which formed the basis for the Order of Contempt. On October 22, 1985, Petitioner once again appeared before the Grand Jury and testified fully for approximately two (2) hours. At one point during the October 22, 1985 session, however, the Petitioner became concerned with a line of

questioning relating to a private membership list being utilized by the Prosecutor and sought a recess to allow him to seek a ruling from Judge Mazzone concerning the propriety of this questioning, which Petitioner and his counsel believed implicated his First Amendment Associational rights. U.S. CONST. amend. I. A Hearing was held on October 22, 1985, regarding the appropriateness of this line of inquiry. After hearing argument from Petitioner's counsel, Judge Mazzone ordered that the Petitioner be remanded to the custody of the United States Marshal's Office. The Petitioner was thereupon handcuffed and taken to the Essex County House of Corrections. An oral Motion to Purge Contempt would not be entertained by Judge Mazzone at the time. On October 23, 1985, Petitioner's counsel filed a Motion For Reconsideration And/Or Clarification of the Order of Contempt, which was denied after hearing by Judge Mazzone. The Petitioner

was brought before the Grand Jury the next day, October 24, 1985, and his counsel simultaneously filed a Motion To Purge Contempt. Petitioner testified before the Grand Jury for the entire day and was finally released from custody at the end of the day when the Prosecutor stated that he would not oppose the Motion and the court ordered him released. On November 7, 1985, Petitioner duly filed a Notice of Appeal with the First Circuit. Jurisdiction in the district court was predicated upon 28 U.S.C. §§ 1826 (1982) and 28 U.S.C. §§ 1291 (1982). On December 20, 1985, Petitioner's appeal was dismissed by the First Circuit on the ground that it was moot since he had purged himself of contempt.

STATEMENT OF FACTS

On August 15, 1985, Petitioner appeared before the Federal Grand Jury in Boston, Massachusetts, to produce documents and give testimony in response to a subpoena duces tecum directed to the Keeper of the Records of Caucus Distributors, Inc. ("CDI"), a non-profit political organization. During the course of the questioning of the Petitioner, he was ushered out of the Grand Jury room and served with a personal subpoena for his testimony. During his next Grand Jury appearance on August 29, 1985, the Petitioner invoked his fifth amendment right to be free from self-incrimination. U.S. CONST. amend V. On September 24, 1985, an Immunity Order was signed by United States District Judge William Young. 18 U.S.C. §§ 6002 & 6003 (1982). On September 26, 1985, Petitioner was again called upon to appear before the Grand Jury. This appearance was his first one since the entry of the Immunity Order.

Immediately after receiving the Order, the following interchange occurred between the Petitioner and Assistant United States Attorney Daniel I. Small:

Q. Do you have any information or any knowledge of credit card transactions conducted by entities related to or associated with Lyndon LaRouche?

A. On the advice of counsel, I respectfully decline to answer that question on the grounds that it could tend to interfere with my Constitutional right to freely associate and my Constitutional right to freedom of speech.

Q. Do you have any knowledge of unauthorized credit card charges being made by individuals employed by or associated with Caucus Distributors?

A. May I consult with counsel on this?

Q. Yes, you may.

(Witness leaves room)

Q. Sir, have you had an opportunity to

consult with counsel?

A. I have.

Q. What is the answer to the question?

A. On the advice of counsel, I respectfully decline to answer that question on the grounds that it could tend to interfere with my Constitutional right to freely associate and my Constitutional right to freedom of speech.

Q. Sir, do you have any knowledge of unauthorized credit card transactions being made by anyone associated with Campaigner Publications?

A. Again, on the advice of counsel, I respectfully decline to answer that question on the grounds that it could tend to interfere with my Constitutional right to freely associate and my Constitutional right to freedom of speech.

Despite being told by Petitioner's counsel that his client might not invoke his first amendment rights with response to every question, the

AUSA terminated the Grand Jury session.

On or about September 30, 1985, the Government filed a Motion to hold the Petitioner in contempt of court. In response to this Motion, Petitioner stated that he was prepared to answer the three (3) questions posed to him as long as he was not thereby waiving his right to assert his first amendment privilege in response to more intrusive questions. The Petitioner also noted once again that his attorney had informed the Prosecutor during the Grand Jury session that the Petitioner might not invoke his privilege in response to every question and that the Prosecutor should therefore continue beyond the initial three (3) questions.

On October 3, 1985, a Contempt Hearing was held before The Hon. A. David Mazzone, United States District Judge for the District of Massachusetts. During the course of this hearing, Petitioner's counsel expressed fear that by holding Mr. Greenspan in contempt and

ordering that he could no longer assert a first amendment privilege that the Court would be affording the Prosecutor carte blanche to inquire into protected political associations. Furthermore, counsel pointed out that such a ruling would be improper as it would literally have been made in a vacuum and that the court's only inquiry was into Mr. Greenspan's contempt in not answering the three (3) questions which were "on the table". The Court stated during the hearing the following:

> It's just that the direction of the questions that you fear and legitimately fear are 180 degrees off the point. I don't see, first, that Mr. Small will ask those questions.
> Secondly, I don't see that if he should dare to ask those questions, Mr. Greenspan would not be alert enough to say, "I am sorry. That's a question I want to ask my attorney about." And you (Petitioner's counsel) and Mr. Small outside can come back to me. I see no problem in that regard, and I don't see that Mr. Greenspan's rights are in any way affected by that.

(A. 5 - 6). After hearing arguments of counsel, Judge Mazzone held the Petitioner in civil

contempt until such time as he was willing to testify before the Grand Jury. (A. 3 - 4). 28 U.S.C. § 1826 (1982). Pursuant to Rule 20 of the Local Rules of the First Circuit, Judge Mazzone suspended the Petitioner's commitment for forty eight (48) hours.

By letter dated October 3, 1985, Petitioner's counsel informed Judge Mazzone that his client was prepared to testify before the Grand Jury and answer the questions that he had previously declined to answer. On October 4, 1985, Judge Mazzone endorsed the letter on the bottom, stating that in view of the fact that the Petitioner had indicated his intention to purge himself of contempt, the Court would:

> suspend the time of his surrender from October 5, 1985 at 10:00 A.M. to October 10, 1985 at 10:00 A.M. at which time he will appear before the Grand Jury. The Order of contempt will stand pending his appearance.

Petitioner appeared before the Grand Jury on October 10, 1985 and testified for approximately five (5) hours. During the course of

that testimony, he was asked and he answered the three (3) questions which formed the basis for the Order of Contempt. On October 22, 1985, Petitioner once again appeared before the Grand Jury and testified fully for approximately two (2) hours. At one point, however, Petitioner and his counsel became concerned with a line of questioning relating to a private membership list of a political organization being utilized by the Prosecutor and sought a recess to allow them to seek a ruling from Judge Mazzone concerning the propriety of this questioning, which the Petitioner believed implicated his first amendment associational rights. This procedure was expressly sanctioned by Judge Mazzone during the October 3, 1985 Hearing. (A-6).

A Hearing was held that same day (October 22) before Judge Mazzone on the Petitioner's request for a ruling. After hearing arguments from Petitioner's counsel, Judge Mazzone held that the Petitioner had never purged his original

contempt, was still in contempt and he therefore remanded the Petitioner to the custody of the United States Marshal's Office until such time as he purged himself of contempt. Petitioner's counsel pointed out that Petitioner had answered the only three (3) questions which formed the basis of the contempt. This argument was rejected by the Court. Additionally, Petitioner's counsel made an oral motion to purge the contempt which was denied by the Court.

The Petitioner was taken to the Essex County House of Corrections in Lawrence, Massachusetts that same day. The following day, October 23, 1985, Petitioner's counsel filed a Motion For Reconsideration And/Or Clarification of the Order of Contempt, which was denied after hearing by Judge Mazzone. Petitioner was brought before the Grand Jury the next day, October 24, 1985, and his counsel simultaneously filed a Motion to Purge his contempt. Petitioner testified before the Grand Jury for the entire

day and was finally released from custody at the end of the day when the Prosecutor stated that he would not oppose the Motion and the court ordered him released. Petitioner has since made additional appearances before the Grand Jury. To this date, Petitioner is still under Crand Jury subpoena and additional appearances are expected. Furthermore, the Prosecutor has not finished his questioning on the private list which precipitated Petitioner's request for a ruling. Finally, since the Petitioner is an immunized witness, he may very well be called at any eventual trial as a witness for the Government.

I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT THAT HIS APPEAL FROM A CIVIL ORDER OF CONTEMPT WHICH HE SUBSEQUENTLY PURGED WAS MOOT BECAUSE IT IMPLICITLY CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH AND NINTH CIRCUITS AND BECAUSE IT SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The law is clear that an appeal lies to review an adjudication of contempt whether it is characterized as civil, remedial or coercive in nature. In re Roche, 448 U.S. 1312, 1316 (1980). The judicial power of the federal courts extends only to "cases and controversies". US CONST. art. III, § 2. This "case or controversy" requirement guarantees that the issues to be reviewed are definite and concrete and touch upon the legal relations of parties having adverse legal interests. DeFunis v. Odegaard,

416 U.S. 312 (1974); United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968). In other words, it must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Aetna Life Insurance Co. v. Haworth, 300 U.S. 229, 240-41 (1937).

The United States Court of Appeals for the First Circuit held that since the Petitioner had purged himself of contempt, his appeal became moot. (A. 1-2). More particularly, the First Circuit held that non-legal as distinguished from legal collateral consequences could not save a purged civil contempt from a finding of mootness. This ruling conflicts with prior decisions of the United States Supreme Court. While the discharge of a civil contempt Order by the person held in contempt will generally moot any appeal on the contempt judgment,

In re Hunt, 754 F.2d 1290, 1293 (5th Cir. 1985), this is not a hard and fast rule. See In re Campbell, 628 F.2d 1260 (9th Cir.1980); In re Special September 1978 Grand Jury (II) (Wall), 590 F.2d 245 (7th Cir. 1979). An exception to the rule is where the unreviewed contempt finding carries with it collateral consequences. A leading case finding a justiciable controversy after a contemnor has purged himself of contempt is United States v. Galante, 298 F.2d 72 (2d Cir. 1962). In Galante, the defendant had been held in contempt and was subsequently released from jail. While the Second Circuit held the defendant's appeal to be moot, its reasoning clearly supported a finding of non-mootness in the present case. In Galante, the Second Circuit rested its decision on the fact that the "moral stigma of a judgment which no longer affects equal rights" does not present a case or controversy for appellate review. Id. The Court in Galante was quick to point out, however, that

the defendant in that case had not shown any collateral consequences of the contempt judgment. Id. at 73. More particularly, the Court noted that the defendant had sustained a prior felony conviction and that any damage to his reputation from a non-felony contempt judgment would be minimal. Id.

Similarly, in United States v. Frumento, 552 F.2d 534 (3d Cir. 1977), a witness was held in contempt for refusing to testify at a separate criminal trial of his co-defendants. While his appeal was pending, the trial concluded and the witness was therefore released from custody. The Court nevertheless held that the appeal was not moot. In so ruling, the Court noted the importance of "having review available when significant interests are at stake" and considered it significant that the witness might again be called to testify before a Grand Jury or at trial if his co-defendants'convictions were reversed and a new trial ordered. Id. at 540.

This Court has never held that collateral consequences must be legal in order to present a "case or controversy". In Street v. New York, 394 U.S. 576 (1969), the petitioner took an American flag and burned it on a New York City street corner. The petitioner also made disparging remarks about the flag. The petitioner was accused, convicted and given a suspended sentence for malicious mischief consisting of a violation of a New York statute making it a misdemeanor publicly to mutilate, deface, defile, defy, trample upon, or cast contempt upon an American flag either by words or act. The conviction was affirmed both by the Appellate Division and by the New York Court of Appeals. On appeal, this Court reversed and remanded the case. In so doing, this Court rejected the State's argument that the case was moot due to the fact that the one-year period within which the suspended sentence might have been replaced with a prison sentence under New York Law had expired. The

Court recognized that since the conviction could result in the Petitioner's loss of employment that a justiciable controversy was presented. The Court also noted that the unreviewed conviction could be used at any later criminal proceeding to rebut character evidence adduced by the petitioner. Id. at 579 n.3. The Court accepted this argument even though there was no criminal proceeding pending against the Petitioner at that time. Also, this Court held in Ginsberg v. New York, 390 U.S. 629, 633 (1968), that the case of a New York appellant was not moot even though the time for revocation of his suspended sentence had expired because it was possible that his license to operate a luncheonette might be withdrawn in consequence of his conviction. Id. at 633 n.2. The Court also noted that this was only a potential threat as no proceedings had been initiated as of that point in time.

The First Circuit's holding of mootness

clearly conflicts with the pronouncements of this Court so as to cry out for this Court's supervisory power. As was pointed out to the First Circuit, Judge Mazzone's incarceration of the Petitioner after finding him in civil contempt carries substantial collateral consequences for the Petitioner. As was demonstrated by the Petitioner's Certification, (A. 7-8), the Petitioner has run for political office in the past and has already announced for Congress from New Jersey for next year's elections. As was also demonstrated, newspapers in New Jersey had already carried accounts of Petitioner's contempt citation and subsequent incarceration. Unless the contempt finding is reviewed and the injustice rectified, it will continue to besmirch the Petitioner's "good name". Furthermore, it will provide "cannon fodder" for the Petitioner's opponents and unless the contempt citation is overturned, he will essentially be powerless to rebut the charges. Since this contempt citation

and subsequent incarceration can adversely affect his ability to run for political office, it clearly presents a live "case of controversy" for purposes of the United States Constitution just as the possible consequences in Street v. New York, supra, and Ginsberg v. New York, supra, presented live controversies to this Court.

Petitioner is also subject to further appearances before the Grand Jury and subject to the possibility of being called as a witness in any future trial. Under Rule 608 (b) of the Federal Rules of Evidence, the prior contempt citation of the Petitioner may well be "fair game" in assessing credibility in any future proceeding. Fed. R. Evid. 608 (b). By denying review under the circumstances of this case, the First Circuit's decision flys in the face of the admonition in United States v. Frumento, 552 F.2d 534 (3d Cir. 1977), to have review available when significant interests are at stake. Id. at 540. A finding of mootness

essentially precludes all review due to the fact that neither the Prosecutor nor the Judge is amenable to civil suit because of their respective immunities. Dennis v. Sparks, 449 U.S. 24 (1980) (absolute immunity for Judges); Stump v. Sparkman, 435 U.S. 349 (1978) (same holding); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for Prosecutors performing prosectorial functions); Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity for Judges); Bradley v. Fisher, 13 Wall 335 (1872) (same holding). The holding of the First Circuit is, therefore, so clearly contrary to the pronouncements of this Court and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. Sup. Ct. R. 17.1 (a).

The decision of the First Circuit also implicitly conflicts with the decisions of the United States Courts of Appeal for the Seventh and Ninth Circuits. In In re Special September

1978 Grand Jury (II) Wall), 590 F.2d 245 (7th Cir. 1979), John Wall, a state legislator appeared before the Grand Jury pursuant to a subpoena but refused to testify based upon both a constitutional and legislative privilege. An immunity Order under 18 U.S.C. § 6003 (1982) was issued. After the immunity Order was entered, Wall was called before the Grand Jury and again he refused to testify. At a subsequent contempt hearing the Judge determined that the immunity Order complied with legal requirements and found that the defendant was in civil contempt. At that time, he committed the witness. The Judge stayed, however, execution of the sentence and Wall informed the Judge that he was willing to testify prior to his incarceration. At his next Grand Jury appearance, Wall testified fully and without incident. The subpoena was continued for further appearance as may be directed by the person conducting the Grand Jury proceedings. Id. at 247. The Seventh Circuit noted that the

release from an order of custody was not the only relief that was sought by the appellant's appeal. Rather, the appellant also sought to vacate the Order of Immunity. As such, the Seventh Circuit noted that:

> The fact the order of confinement has been mooted does not prevent this Court from determining any remaining issue if it represents "a substantial controversy, between parties have adverse legal interests, of sufficient immediacy and reality...."

Id.; Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974). The Seventh Circuit then held that the district court judgment on the validity of the Immunity Order represented a substantial continuing controversy since the Order granting the petition for immunity required the witness to testify before the Special September 1978 Grand Jury (II) and produce documents, without resort to the privilege against self-incrimination. The Order was not restricted by date. As it may have been necessary to call Wall to testify again as the investigation

proceeded and the witness persisted in his desire not to testify or produce documents, the Seventh Circuit held the matter to be a continuing "controversy between the parties" for purposes of Article III, Section 2 jurisdiction. U.S. CONST. art. II § 3; In re Special September 1978 Grand Jury (II) (Wall), 590 F.2d at 248. The Ninth Circuit came to a similar conclusion in In re Campbell, 628 F.2d 1260 (9th Cir. 1980). In that case, the witness had been told by the foreman of the Grand Jury that he was to be recalled at a later date to testify on the same subject matter forming the basis for the earlier contempt. Id. at 1261.

The decision of the United States Court of Appeals for the First Circuit conflicts with the holdings of both the Seventh Circuit and the Ninth Circuit. In the present case, the Petitioner was ordered to fully testify without invoking his first amendment privilege as to any questions. The situation that allegedly formed

the basis for the Order of contempt was the Petitioner's unwillingness to testify about a private membership list, which he believed protected by the first amendment. Petitioner is still under subpoena by the Grand Jury and at his last session was only excused by the foreman until further notice. At no time has the Prosecutor returned to the list which the Petitioner was reluctant to testify about due to his first amendment concerns. As such, it is highly likely that the situation that formed the basis for the contempt Order is likely to recur. Under the persuasive reasoning of both the Seventh Circuit and the Ninth Circuit, Petitioner's Appeal should not be moot. Nonetheless, the First Circuit has taken a position directly contrary to these two (2) circuit courts of appeal. As noted above, the First Circuit's decision leaves the Petitioner remediless. Such a construction of the law should be avoided. Since a split in the

circuits already exists, this Court should grant Petitioner a Writ of Certiorari to review the judgment of the First Circuit Court of Appeals. See Sup. Ct. R. 17.1 (a).

II. IF THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE MOOTNESS ISSUE, IT SHOULD ALSO GRANT THE PETITIONER A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MASSACHUSETTS THAT PETITIONER WAS IN CONTEMPT DESPITE THE FACT THAT HE HAD ANSWERED THE ONLY QUESTIONS THAT FORMED THE BASIS OF THE CONTEMPT ORDER THAT PETITIONER HAD SOUGHT A RULING FROM THE JUDGE PURSUANT TO THE COURT'S INVITATION AND THAT THE ASSISTANT UNITED STATES ATTORNEY'S OFFICE HAD NEVER SOUGHT A CONTEMPT FINDING SINCE SUCH A RULING SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISION

The civil contempt statute, 28 U.S.C. § 1826 (1982), provides that a witness before a court or grand jury may be held in contempt for refusing without just cause to comply with a court order to testify. The court may "summarily order his confinement... until such time as the witness is willing to give such testimony..."

The purpose behind this statute is to secure testimony through sanction, not punish

a witness by imprisonment. Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978). It has been said on many occasions that a party found in civil contempt:

> carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

Gompers v. Buck's Stove & R. Co., 221 U.S. 418, 443 (1911). In re Grand Jury Investigation, 600 F.2d 420, 423 (3d Cir. 1979); Matter of A Witness Before Special October 1981 Grand Jury, 722 F.2d 349, 351 (7th Cir. 1983); In re Nevitt, 117 F. 448, 461 (8th Cir. 1902). This First Circuit has stated that a person found in civil contempt:

> can only be imprisoned to compel his obedience to a decree. If he complies,...he must be released, for his confinement is not as punishment for an offense of a public nature.

Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946) (emphasis supplied).

In the instant case, Petitioner was held in contempt for failing to answer the first three (3) questions posed to him before the Grand Jury. These were the only questions he had been asked as of the date of the contempt hearing, although Petitioner's counsel had suggested to the Assistant United States Attorney that he proceed with additional questions. In his Order of October 3, 1985, Judge Mazzone ordered Greenspan confined "until such time as he is willing to give such testimony...." (emphasis supplied). This language parallels the wording of the civil contempt statute. 28 U.S.C. § 1826 (1982).

Pursuant to Rule 20 of the Rules for the First Circuit, Petitioner's commitment was suspended for forty eight (48) hours, which would have been Saturday, October 5, 1985. However, prior to that date Petitioner's counsel informed the Court that he was willing to testify before the Grand Jury. As a result, Judge

Mazzone suspended the time of commitment until October 19, 1985, when Greenspan was to appear before the Grand Jury. The Order of Contempt was to stand "pending his appearance."

Petitioner followed up his indication that he was willing to testify by thereupon testifying before the Grand Jury on October 10 and October 22, 1985. On those occasions he testified fully, answered the three (3) questions which formed the basis of the contempt, and did not refuse to answer questions put to him before the Grand Jury. When Greenspan appeared before Judge Mazzone on October 22, it was because he had requested a ruling from the court. He was not brought before the Court by the Prosecutor for refusing to answer questions nor did the Prosecutor seek to have him committed. Despite this, Judge Mazzone ordered Petitioner confined and he was immediately jailed.

As noted above, 28 U.S.C. §§ 1826 (1982) provides that a witness may be confined until he is

"willing to give the withheld testimony." Judge Mazzone's Order utilized the identical language, and at the contempt hearing he stated that confinement would commence on October 5 unless Greenspan had either purged himself "or has informed the Court of his willingness to do so...." Greenspan of course informed the Court of his willingness to testify before the Grand Jury prior to the expiration of the forty-eight (48) hours, and then did testify as scheduled.

Based on this fact there was no justification for Petitioner's commitment on October 22. By testifying and answering the questions which formed the basis for the contempt Order, he had done what he previously had refused to do, thereby purging himself of the contempt. See Parker v. United States, supra at 70 (if contemnor complies with Court's decree, "he must be released"); Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965) (civil contempt

sanction "cannot be one that does not come to an end when he repents his past conduct and purges himself"); Gompers v. Bucks Stove, supra at 442 (contemnor is to stand committed "unless and until he performs the affirmative act required by the Court's Order") (emphasis supplied). The commitment of Petitioner based on the earlier contempt after he had testified on two occasions before the Grand Jury flies in the face of elementary principles of civil contempt. There could be no valid coercive purpose to commitment when the witness had already purged himself in fact by doing what he had previously refused to do.

Judge Mazzone stated at the October 23 Hearing on Petitioner's Motion for Reconsideration that he had nothing before him to indicate that Greenspan had ever purged himself of contempt, and that no motion to purge had ever been brought before him. However, Judge Mazzone had been made aware that Greenspan had testified

on October 10 and 22, and he also had the Grand Jury transcripts before him at the October 23 Hearing. As to his statement that no formal motion to purge had ever been made, the above cited cases make it clear that a contempt is purged by the doing of the act which the contemnor had previously refused to do and not by filing a formal motion to purge. In any event, Petitioner's counsel had,in fact,made an oral motion to purge before Judge Mazzone at the Hearing on October 22.

The spurious nature of the commitment Order is also illustrated by the delay in releasing Petitioner on October 24. At the Hearing on Petitioner's Motion for Reconsideration on October 23, Judge Mazzone stated that it was not his intention that Greenspan remain confined, and indicated that if a motion to purge the contempt was brought before him the next day, he would expect that Petitioner would be released. Petitioner remained in the custody of the

Marshal's Office, however, the following day while he testified and was not released until the end of the day when the Prosecutor informed the Court that he did not oppose the Motion to Purge. This delay in releasing Petitioner, which kept him in a constant state of apprehension as to whether or not he would be returned to prison at the end of the day, indicates that the contempt power was being improperly "used solely for intimidation." In re Farkas, 204 F. 343, 345 (S.D.N.Y. 1913).

During the Hearing on Petitioner's Motion for Reconsideration on October 23, Judge Mazzone reviewed the transcripts of Greenspan's Grand Jury testimony on October 10 and 22, and made reference to the frequency with which Greenspan left the Grand Jury room to consult with his counsel. This fact could in no way justifies Judge Mazzone's Order committing Petitioner to the custody of the U.S. Marshal's Office. There is simply nothing in the record to indicate that

Judge Mazzone had read the transcript of Petitioner's Grand Jury testimony at the time he ordered Petitioner confined on October 22, 1985. He could not have based his order of commitment, therefore, on any alleged impropriety relative to the frequency with which Petitioner consulted with counsel. In any event, there was nothing improper about Petitioner's consultation with counsel which could have served as a basis for his commitment. The Grand Jury Foreman permitted Petitioner to leave the Grand Jury room to consult with counsel when he desired. It has been held that such a procedure is a "reasonable and workable accomodation" of the investigating role of the Grand Jury and the Constitutional rights of a witness. United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968). See also United States v. Duncan, 456 F.2d 1401, 1407 (9th Cir. 1972) (witness "permitted to and did consult with counsel as much as she requested"); United States v. George,

444 F.2d 310, 315 (6th Cir. 1971) (noting that witness' attorney "was available to him at all times outside the Grand Jury room, and he had the right to consult with his attorney after every question asked of him"); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971) (witnesses were permitted to leave Grand Jury room and confer with their attorneys; some witnesses followed this course after almost every question).

In the instant case, Petitioner was permitted to leave the Grand Jury room to consult with counsel when he desired to do so. He did not exercise this right after every question and was never told that he could not leave when he requested to consult with his attorney. Thus, Petitioner's actions relative to his consultation with counsel outside the Grand Jury room could in no way serve as a basis for his confinement.

This Court should also note that in its

Order of Contempt, the district court found that Petitioner had refused to answer questions without just cause because there was "no testimonial privilege based on the First Amendment applicable to this witness in this proceeding." The district court also ordered that if the witness appeared again before the Grand Jury, "he shall not use the 'First Amendment' as grounds for refusing to answer further questions." (A. 3 - 4). Furthermore, during the Hearing of October 22, 1985, Judge Mazzone stated that as far as he was concerned the Petitioner could only purge himself of contempt if he answered every question put to him by the Prosecutor regardless of its nature. These rulings and orders were improper.

It has been held that the first and fourteenth amendments to the United States Constitution provide protection against the compelled disclosure of political associations and beliefs. Brown v. Socialist Workers '74 Campaign Committee,

459 U.S. 87 (1972). The protections of the first amendment, including the right to privacy in political association, do not stop at the Grand Jury door. Branzburg v. Hayes, 408 U.S. 667, 708 (1972) ("grand juries must operate within the limits of the First Amendment as well as the Fifth"); Ealy v. Littlejohn, 569 F.2d 219, 227 (5th Cir. 1978); Bursey v. United States, 466 F.2d 1059, 1081-85 (9th Cir. 1972); In re Grand Jury Subpoena, 583 F. Supp. 991, 992-93 (E.D.N.Y. 1984). While the first amendment may rarely justify a witness' absolute refusal to testify at all before a Grand Jury, it clearly does serve as a limitation on the power of a Grand Jury to compel disclosure of certain types of information. A Court must look at the particular questions asked and determine on a question by question basis whether the first amendment justifies the resusal to answer. Bursey v. United States, supra. Thus, the district court's ruling that

Greenspan had no first amendment privilege, could not claim such a privilege with respect to any future questions and could only purge himself by answering every question no matter how intrusive on his first amendment rights was improper.

In any event, Petitioner did not refuse to answer any further questions by claiming a first amendment privilege and, as such, the Order of confinement could not have been based on such a consideration. In fact, Petitioner testified fully and completely after being held in contempt and did not refuse to answer any questions. There was absolutely no justification for Judge Mazzone ordering Petitioner's confinement at the October 22 Hearing. This was especially egregious in view of the fact that Petitioner had brought himself before the Court on that occasion to seek a ruling pursuant to Judge Mazzone's earlier invitation. The actions of the district court in holding Petitioner in

contempt so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of Supreme Court supervision. This Court should, therefore, grant Petitioner a Writ of Certiorari to review the decision of Judge Mazzone. Sup. Ct. R. 17.1 (a)

CONCLUSION

The Supreme Court of the United States should grant the Petitioner a Writ of Certiorari to review all of the issues raised herein and, upon review, reverse the judgment of the First Circuit Court of Appeals and remand this matter for a decision not inconsistent with the pronouncements of this Court.

Respectfully submitted,

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A MEMBER OF THE BAR OF
THE SUPREME COURT OF THE
UNITED STATES.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1894

IN RE:

GRAND JURY PROCEEDINGS

ELLIOT ISRAEL GREENSPAN,
Appellant.

Before
Bownes, Breyer and
Torruella, Circuit Judges.

MEMORANDUM AND ORDER

Entered December 20, 1985

The United States has moved to dismiss the appeal. The record indicates, and appellant concedes, that he was purged of civil contempt and released from custody on October 24, 1985. Ordinarily, a judgment of civil contempt becomes moot after being purged. See, e.g., In Re Campbell, 628 F.2d 1260, 1261 (9th Cir. 1980); Marshall v. Whittaker Corp., 610 F.2d 1141, 1145 (3rd Cir. 1979); Matter of Berry, 521 F.2d 179,181 (10th Cir. 1975), cert. denied,

423 U.S. 928 (1975). The purged adjudication of civil contempt "... carries with it no possibility of collateral deprivations of civil rights or other specifically legal consequences." Marshall, 610 F.2d at 1145. We have found no authority indicating that the type of speculative, non-legal collateral consequences that appellant cites will prevent a challenge to a civil contempt adjudication that has been purged from being moot. In addition, we find no merit to appellant's other arguments as to why this case is not moot. Accordingly, the motion to dismiss on grounds of mootness is granted. The appeal is dismissed.

By the Court,

/s/ Francis P. Scigliano
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE GRAND JURY) M.B.D. No. 85-681
(ELLIOT ISRAEL GREENSPAN))

ORDER

Upon Motion of the United States, and after consideration of the pleadings and a hearing before this Court, this Court finds that:

(1) Elliot Israel Greenspan is a witness in a United States grand jury proceeding;

(2) He has refused to testify before said grand jury pursuant to:

(a) a lawful grand jury subpoena;

(b) an Order of this Court, dated September 24, 1985; and

(c) the Order of the grand jury foreman,

(3) He has done so without just cause, there being no testimonial privilege based upon the First Amendment applicable to this witness in this proceeding.

Therefore, it is hereby ORDERED that:

(1) The witness, Elliot Israel Greenspan, is in contempt of this Court for said refusal to testify, pursuant to Title 28, United States Code, Section 1826;

(2) The witness, Elliot Israel Greenspan, is ordered confined until such time as he is willing to give such testimony (not to exceed the term of the grand jury or eighteen months);

(3) Should the witness agree to again appear before the grand jury, he shall not use the "First Amendment" as grounds for refusing to answer further questions. This Court will hear and receive a motion to hold the witness in criminal contempt (pursuant to Title 18, United States Code, Section 401 and Fed. R.Crim. P. 42) if he attempts to claim such a "privilege" to additional questions.

/s/ A. David Mazzone
UNITED STATES DISTRICT JUDGE

October 3, 1985
Date

looking for? What political philosophy, what right, what ideas, what deeply held beliefs will he ask?

If he does, why doesn't Mr. Greenspan have the right at that point to refuse to answer? I mean, why can't he do everything he is doing now?

MR. REINFELD: If he took his First Amendment rights, I might not be able to--that was one of the requests to release by Mr. Small.

THE COURT: I think what I will do is simply --

MR. REINFELD: That is what I am saying.

THE COURT: No, you must understand. I am not going to give him a blank check to claim it (the First Amendment) every time Mr. Small asks a question so that the matter has too long a history. It comes to me going back to April. I am not going to review this

matter --

MR. REINFELD: Not with this individual.

THE COURT: Not Mr. Greenspan, but the next witness and it will be the next witness. As I say, we are not here in a vacuum, unfamiliar with the matter. It's just that the direction of the questions that you fear and legitimately fear are 180 degrees off the point. I don't see, first, that Mr. Small will ask those questions.

Secondly, I don't see that, if he should dare to ask those questions, Mr. Greenspan would not be alert enough to say, "I am sorry. That's a question I want to ask my attorney about." And you and Mr. Small outside can come back to me. I see no problem in that regard, and I don't see that Mr. Greenspan's rights are in any way affected by that.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1894

IN RE:

GRAND JURY PROCEEDINGS

ELLIOT ISRAEL GREENSPAN,
Appellant.

CERTIFICATION

I, ELLIOT ISRAEL GREENSPAN, do hereby certify as follows:

1. I am a citizen of the State of New Jersey and am currently running for Congress from the Ninth District in New Jersey.

2. On October 22, 1985, I was jailed for a contempt of court which I did not commit and spent two (2) days in the Lawrence County Jail.

3. The contempt and subsequent incarceration were widely reported in several newspapers, which encompass the district in which I am running for Congress. Copies of these

articles are annexed hereto.

4. I feel that unless this contempt is reversed that it will be impossible for me to clear my name before the electorate and, as such, the unreviewed contempt citation will adversely affect my chances for election.

5. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: November 26, 1985

/s/ Elliot Israel Greenspan